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(b) Where it is practicable, by day one ball shall be exhibited on the side of the vessel nearest the wreck and two placed vertically on the other side; three fixed white lights similarly arranged, but not the ordinary riding light, shall be shown from sunset to sunrise.

GENERAL DIVISION 13.

The establishment of a permanent international maritime commission.

(a) The composition of the commission.

(b) Its powers and authority.

Resolved, That for the present the establishment of a permanent international maritime commission is not considered expedient.

NOTE FROM THE MEMBERS OF THE ARBITRAL TRIBUNAL IN THE PIOUS
FUND CASE TO THE NETHERLANDS MINISTER FOR FOREIGN AFFAIRS,
MAKING SOME SUGGESTIONS AS TO THE CONDUCT OF FUTURE ARBI-
TRATIONS.

INTERNATIONAL BUREAU
OF THE
PERMANENT COURT OF
ARBITRATION.

THE HAGUE, *October 14, 1902.*

Mr. Minister,

The undersigned members of the Arbitration Tribunal constituted in virtue of the Treaty of Washington of the 22nd of May 1902, between the United States of America and the United States of Mexico, have the honor to address to Your Excellency, as President of the Administrative Council of the Permanent Court of Arbitration, this note containing some reflections concerning the procedure to be followed before the Permanent Court of Arbitration. At the same time the undersigned express the desire that Your Excellency will be good enough to communicate this note to all the members of the Administrative Council requesting them to submit it to the kind consideration of their Governments.

The Convention signed at The Hague on the 22nd of July 1899 for the Pacific Settlement of International Disputes, presents, without any doubt, a just and rational basis for the procedure to be followed before

an International Arbitration Tribunal. The two great American States that in virtue of the Treaty of Washington of the 22nd of May 1902, have agreed to make application to The Hague Court concerning arbitral procedure in order to decide their difference relative to the "Pious Fund of the Californias" can certify that the course of the Arbitral Tribunal, of which we have had the honor to be the members, has conformed to the provisions of this act.

The regulations for arbitral procedure prepared by the Peace Conference have afforded a solid basis and solid rules for the procedure of the Tribunal of Arbitration between the United States of America and the United States of Mexico.

Nevertheless, desirous of contributing their feeble efforts towards the progressive development of international arbitration and foreseeing in the future possible difficulties in the performance of the regulations of arbitral procedure sanctioned by the Hague Convention, the undersigned members of the first Arbitration Tribunal that held its sittings at The Hague, consider themselves under the moral obligation of submitting to the kind consideration of the interested Governments some points which may be regulated easily by subsequent agreements between the States in litigation. The undersigned arbitrators are deeply impressed with a feeling of their duty to contribute to the better interpretation and carrying out of the Hague Convention for the Pacific Settlement of International Disputes and to consolidate the regular course of such future Arbitral Tribunals as may be constituted with the view of re-establishing good understanding between nations.

It is desirable that jurisprudence be established in the domain of international arbitration and it is to be hoped that each future Arbitral Tribunal will add a stone to the edifice of international arbitration whose foundations were laid by the Hague Convention of 1899.

Such are the motives of our action.

The observations to which we venture to take the liberty of attracting the attention of the high Governments through the kind intervention of Your Excellency are as follows:

I.

According to Article XXII of The Hague Convention, the International Bureau is the intermediary of communications relating to meetings of the Permanent Court of Arbitration. The signatory Powers have agreed to communicate to the International Bureau certified copies of all

arbitration stipulations entered into between them and of all arbitration verdicts having to do therewith.

It is evident that this obligation is of weight above all in these cases in which the Permanent Court of Arbitration has to decide any dispute arising between the signatory Powers.

And yet The Hague Convention does not precisely state the method to be observed in cases which the Permanent Court of Arbitration is called upon to adjudicate.

In view of this circumstance the undersigned express the opinion:—

That Powers in litigation that have agreed to submit their conflict to the Permanent Court of Arbitration, immediately upon the signature of the compromise shall communicate this act to the International Bureau requesting it to take the necessary measures for the installation of the Arbitral Tribunal.

That the same Powers, after the choice of the Arbitrators, shall communicate their names to the International Bureau without delay, and finally,

That the International Bureau, on its part, and without delay, shall communicate to the Arbitrators nominated by the Powers in litigation the signed compromise and the names of the members of the Arbitral Tribunal already designated.

II.

In virtue of Article XXXII and following articles the Arbitrators nominated by the Powers in litigation have been obliged to choose the Umpire, who, according to Article XXXIV, becomes by right the President of the Tribunal.

These stipulations might give rise to some inconvenience which it would be worth while to forestall.

The *Third* or *Fourth* member of the Arbitral Tribunal chosen by his colleagues, who have been nominated directly by the Powers in litigation is not always “Umpire” in the technical sense of this word. He is, in the first place, the member of the Arbitral Tribunal who, having the confidence of his colleagues, is chosen as their colleague.

Still it might occur that this member of the Arbitral Tribunal, chosen by his colleagues, might refuse categorically to take upon himself the Presidency of the Tribunal for motives absolutely personal but perfectly justifiable. Such member chosen on account of his great reputation as a jurist and because of his profound learning, would be eminently useful

as member of the Arbitral Tribunal. But because of his absolute refusal to preside at the meetings of the Tribunal, the other members already nominated, would be compelled to abandon their choice and by so doing deprive the Tribunal of the enlightenment of a jurist and very distinguished statesman.

In consideration of these circumstances the undersigned express the opinion:—

That future compromises shall leave to the members of the Arbitral Tribunal full powers to select from among themselves the President of the Tribunal, and

That the nomination of the President of the Arbitral Tribunal shall take place at the first meeting of the members nominated or chosen.

III.

Article XXXVIII of The Hague Convention leaves to the Arbitral Tribunal the choice of the language it shall use and shall authorize to be used before it.

While acknowledging the wisdom of this stipulation, the undersigned deem it necessary to direct the attention of the Governments in litigation to the necessity of arriving at an agreement beforehand with regard to the language they may desire the discussions before the Tribunal to take place in. It is absolutely necessary that the point be made clear prior to the commencement of the labors of the Tribunal in order that the selection of the Agent and Counsel may be made with a view to their knowledge of the language in which the pleadings before the Arbitrators are to be made. The necessity of translating, for the use of Counsel, the speeches made before the Tribunal, inevitably provokes a great loss of time. In view of these observations it is desirable:—

That the choice of the Agent and Counsel before the Arbitral Tribunal be made in conformity with the wishes of the Powers in litigation as to the languages to be used before the Tribunal, and

That future compromises shall state the desire or decision of the contracting Powers in this regard.

IV.

Article XXXIX of The Hague Convention stipulates that the arbitral procedure shall include as a general rule, two distinct phases: *Preliminary examination* and *discussion*.

The preliminary examination consists in the communication made by

the respective Agents to the Tribunal and to the opposite party of all records printed or written and of all documents containing the arguments invoked in the case.

This distinction between the preliminary examination and the discussions is absolutely justified and necessary. However it is not practicable except on condition that the parties in litigation observe it by producing all the records and documents prior to the commencement of the discussions. In other words, the preliminary examination, as a general rule, must be finished *before* the commencement of the discussions before the Tribunal. Only as a rare exception and one legalized in due form, may the Tribunal admit the production of new records and documents during the course of the discussions, under the reservation specified in Article XL and following articles of the Hague Convention.

In view of these observations the undersigned express the opinion:—

That the distinction between the two phases, namely the preliminary examination and the discussions, be observed as strictly as possible by the parties in litigation.

That, if necessary, a longer time be granted by the parties for the communication through the intervention of the International Bureau or directly to the members of the Tribunal and vice versa of all documents and records.

That the Arbitral Tribunal, once assembled, may without loss of time proceed with the discussion, and

That after closing of the discussions, that is to say in the time that intervenes between the close of the discussions and the pronouncement of the arbitral verdict, no communication of any new records or writings shall be allowed on the part of the parties in litigation.

V.

The Hague Convention has acknowledged the right of the Powers in litigation to reserve in the compromise the right to demand a revision of the arbitral verdict (Article LV). This demand may only be made on the ground of the discovery “of some new fact which would be of a nature to exercise a decisive influence on the verdict.” The same Arbitral Tribunal that has adjudicated the case is also required to rule on the merits of the demand for a revision. Lastly the compromise should determine the period within which the demand for a revision is admissible.

This stipulation may, in practice, provoke very grave inconvenience.

If the period within which the demand for a revision is admissible be very short (as that stipulated in the above mentioned Protocol of Washington of the 22nd of May, 1902), it will very rarely happen that a new fact, giving rise to a revision, will be discovered in time.

If, on the contrary, a rather long period be stipulated, or if the right be accorded of demanding a revision at any time, the obligatory force of the arbitral verdict will remain for a long time or forever in suspense.

This does not seem to be at all desirable.

In fact the arbitral verdict will almost always provoke discontent in one of the parties.

If this feeling be not appeased in the shortest possible time by reason of the *chose jugée* or of the *fait accompli* the conflict between the nations in litigation may assume an acute character endangering international peace.

Hence the undersigned express the opinion:—

That in the compromise the smallest possible use be made of the power accorded by Article LV of The Hague Convention.

Such, Mr. Minister, are the few views and observations that we have the honor to submit to your high approval with the respectful request that they be sent to all the signatory Powers of The Hague Convention for the Peaceful Settlement of International Disputes.

Accept, Mr. Minister, the assurances of our high consideration.

(Signed.)	HENNING MATZEN.
“	EDWARD FRY.
“	MARTENS
“	T. M. C. ASSER.
“	A. F. DE SAVORNIN LOHMAN.